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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-675

CHRISTOPHER KAPPOS,
Appellant,

v.

STATE OF IOWA,
Appellee.

On Appeal from the Supreme Court of Iowa

JURISDICTIONAL STATEMENT

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v.

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On Appeal from the Supreme Court of Iowa

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Iowa entered September 9, 1971, affirming the judgment of the trial court as it regards the method of selecting the jury panel for municipal courts within the State and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is present.

OPINION BELOW

The opinion of the Supreme Court of Iowa is reported at 189 NW2d 563 and is set forth in the Appendix (App. A, p. A-1).

JURISDICTION

This case was tried in the Municipal Court of the City of Ames, Story County, Iowa, wherein the Appellant was charged and convicted of the indictable misdemeanor crime of knowingly permitting minors to purchase beer upon his business premises and was appealed to the Supreme Court of Iowa upon the grounds that Section 602.34, Code of Iowa, which governs the eligibility of persons to serve upon the jury panel, was unconstitutional as a violation of the 14th Amendment to the United States Constitution. The Supreme Court of Iowa, by a 6-2 decision, found Section 602.34, Code of Iowa, compatible with the 14th Amendment to the Constitution of the United States. The judgment of the Supreme Court of Iowa was entered on September 9, 1971 (App. A, p. A-1) and notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Iowa on October 8, 1971 (App. C, p. A-21).

The jurisdiction of the Supreme Court of the United States to review this judgment by direct appeal is conferred by 28 USC § 1257(2). The following cases sustain the jurisdiction of the Supreme Court of the United States to review this case upon direct appeal. **Winters v. People of State of New York** (1948), 333 US 507, 92 L.ed. 840, 68 S.Ct. 665; **Miller v. Schoene, Virginia** (1928), 276 US 272, 72 L.ed. 568, 48 S.Ct. 249.

QUESTIONS PRESENTED

A. Where a Municipal Court of a state has jurisdiction co-extensive with the territorial limits of the County in which the court is situated, is it violative of the 14th Amendment to the United States Constitution to limit by statute (Section 602.34, Code of Iowa) the selection of the jury panel to residents within the corporate limits of the

city thereby excluding all residents of the county residing beyond the limits of the municipality.

B. Where a Municipal Court of a state has jurisdiction co-extensive with the territorial limits of the County in which the court is situated, does the jury panel which is selected under authority of statute (Section 602.34, Code of Iowa) represent a cross-section of the community served by the court which arbitrarily excludes from its jury selection as a class all rural residents of the county residing beyond the limits of the municipality.

CONSTITUTIONAL AND STATUTE PROVISIONS

That the statutory provisions of the State of Iowa and the constitutional amendment directly involved in this appeal are as follows:

Section 602.34, Code of Iowa, reads:

> "The commission, in the presence and under the supervision of the judge of said court, if only one, and if more than one, a judge of said court designated by the judges thereof, shall, on the establishment of the court, prepare from the pollbooks or election register of the last preceding general election in the territory included in the municipal court district, a list equal in number of one-tenth of all electors thereon qualified for jury service, which shall be known as the 'jury list'; and shall, before the last Monday in December following the general municipal election thereafter, **prepare such a list from the pollbooks or election register of the preceding general municipal election**" (Emphasis supplied).

Section 1 of the 14th Amendment to the Constitution of the United States reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Other related Iowa statute laws applicable to this case are Sections 602.14, 602.15, 602.16 and 753.2, Code of Iowa, and said statutes are set forth in full in Appendix B, p. A-19.

STATEMENT

On January 23, 1970, the Appellant did reside as well as own and operate a business known as Chris's Tavern within the Town of Cambridge located in Story County, Iowa (R.p. 42, ll. 26-29).

On or about January 23, 1970, four persons under the age of twenty-one years entered Appellant's place of business and consumed beer upon the premises (R.p. 37, ll. 2-7; R.p. 37, ll. 26-34; R.p. 39, ll. 6-13; R.p. 36, ll. 30-33; R.p. 38, ll. 15-17; R.p. 39, ll. 25-28).

Police officers discovered the minors and their activity and shortly thereafter the Appellant was charged in the Municipal Court in the City of Ames, Story County, Iowa, by information of the Story County Attorney with the indictable misdemeanor crime of knowingly permitting minors to consume beer upon the business premises of the Appellant in Cambridge, Iowa (R.p. 3, ll. 12-31).

The Municipal Court of the City of Ames, Story County, Iowa, which is located within the corporate limits of the City of Ames, does, by statute have jurisdiction co-extensive with the County in all criminal misdemeanor cases which includes the charge against this Appellant (Section 602.34, Code of Iowa) (App. B, p. A-19).

The trial court fixed March 11, 1970, for the Appellant to commence trial before a jury panel consisting entirely of residents from within the corporate limits of the City of Ames, Iowa.

On March 10, 1970, the Appellant, prior to jury selection and trial, filed written objection to the jury panel (R.pp. 4-13), claiming that the selection of the members of the jury panel exclusively from within the corporate limits of the City of Ames, Iowa, violated the 14th Amendment to the Constitution of the United States.

On March 11, 1970, prior to the commencement of jury selection, the trial court orally overruled the said motion of the Appellant (R.pp. 18-22).

Trial commenced March 11, 1970, before a jury selected entirely from residents of the City of Ames. On March 12, 1970, the jury returned a verdict of guilty (R.p. 64, ll. 3-8) and judgment was entered by the Municipal Court of the City of Ames, Story County, Iowa, upon the verdict on March 20, 1970 (R.p. 64, ll. 10-15).

On March 20, 1970, the Appellant appealed the judgment of the Municipal Court of the City of Ames, Iowa, to the Supreme Court of Iowa (R.pp. 68-71).

The constitutional question regarding Appellant's objection to the jury panel were raised by Brief Points A and B of Error I of Division I of Appellant's errors relied upon for reversal contained in Appellant's Brief and Argument at pages 9 through 35 thereof.

On September 9, 1971, the Supreme Court of Iowa affirmed the judgment of the trial court in a 6-2 decision. The minority members of the Iowa Supreme Court joined in a dissenting opinion stating that the judgment should be reversed upon the grounds that the selection of the jury under Section 602.34, Code of Iowa, was violative of the

due process clause of the 14th Amendment of the United States Constitution (App. A, p. A-1).

On October 8, 1971, the Appellant appealed the judgment of the Supreme Court of Iowa to the Supreme Court of the United States and filed the notice thereof with the Clerk of the Iowa Supreme Court (App. A, p. A-1).

THE QUESTIONS ARE SUBSTANTIAL

This case raises the substantial question as to the power of a state through its legislature to limit the area from which jurors may be selected for a municipal court to the municipality in which the court is situated when the court has county-wide jurisdiction thereby eliminating all rural and farm residents from the jury selection process.

In the present case the Appellant was a resident of the Town of Cambridge (population, 661, Census of Population of the United States Department of Commerce/Bureau of Census, December, 1970), and did operate a tavern business within the same Town. On February 9, 1969, the Appellant was charged with the indictable misdemeanor crime of knowingly permitting minors to purchase beer upon his business premises. Prior to trial the Appellant objected to the method of selecting jurors in the Municipal Court of the City of Ames, Story County, Iowa (R. p. 11). The trial court overruled Appellant's objection to the jury panel and the Appellant appealed the ruling of the trial court to the Iowa Supreme Court raising the same question in its Brief and Argument by Brief Points A and B of Error I of Division I. The Supreme Court of Iowa sustained the decision of the lower court by a 6-2 decision.

In Iowa there have been established twelve municipal courts in as many cities serving eleven counties. The Municipal Court derives its jurisdictional power in the

trial of misdemeanor criminal cases from Section 602.15, Code of Iowa, which reads in part:

> "In all criminal matters the (municipal) court shall exercise the jurisdiction conferred on the district court for the prosecution of misdemeanors . . ."

Also see 602.14 and 602.15, Code of Iowa (App. B, p. A-19).

The district courts of the State of Iowa derive their jurisdiction through Section 753.2, Code of Iowa, which reads:

> "The local jurisdiction of the district court is of offenses committed within the county in which it is held, and of such other cases as are or may be provided by law."

The jury panel from which the Municipal Court jurors are selected is limited to residents of the municipality in which the court is located and to the names as listed upon the pollbooks or election register of the preceding general municipal election. This procedure is set forth in Section 602.34, Code of Iowa, which reads:

> "The commission, in the presence and under the supervision of the judge of said court, if only one, and if more than one, a judge of said court designated by the judges thereof, shall, on the establishment of the court, prepare from the poll books or election register of the last preceding general election in the territory included in the municipal court district, a list equal in number to one-tenth of all electors thereon qualified for jury service which shall be known as the 'jury list'; and shall, before the last Monday in December following the general municipal election thereafter, **prepare such a list from the poll books or election register of the preceding general municipal election**" (Emphasis supplied).

The State of Iowa under Section 602.34, Code of Iowa, has substantially limited the area and population of the county from which jurors may be selected, and such practice and procedure has virtually eliminated all rural and farm population of the county from the jury selection process. The following figures obtained from the Census of Population of the United States Department of Commerce Bureau of Census (December, 1970) show the population of each city within the State of Iowa where a municipal court is located, the population of the county which is served by the court, and the percentage of residents of the county which are excluded from jury service under the prevailing statutory procedure.

Cities Where Municipal Courts Are Located	City Pop.	Counties Served By the Court	County Pop.	% of County Residents Excluded From Jury Service
Ames	39,505	Story	62,783	37%
Cedar Falls	29,597	Blackhawk	132,916	78%
Cedar Rapids	110,642	Linn	163,213	32%
Clinton	34,719	Clinton	56,744	39%
Council Bluffs	60,348	Pottawattamie	86,991	31%
Davenport	98,469	Scott	142,687	31%
Des Moines	200,587	Polk	286,100	30%
Dubuque	62,309	Dubuque	90,609	31%
Marshalltown	26,219	Marshall	41,076	36%
Ottumwa	29,610	Wapello	42,149	30%
Sioux City	85,925	Woodbury	103,052	17%
Waterloo	75,533	Blackhawk	132,916	43%

The injustice and basic principles involved in this case is much akin to the case of **Strauder v. West Virginia** (1880), 100 US 303, 25 L.ed. 664. In this case the State of West Virginia retained a statute upon its books excluding all Negroes from jury service after the passage of the 14th Amendment to the United States Constitution. The court in ruling the statute in violation of the 14th Amendment states:

> "The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is

selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds . . .

"If this is the spirit and meaning of the Amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States and, in regard to the colored race, for whose protection the Amendment was primarily designated, that no discrimination shall be made against them by law because of their color? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

"That the West Virginia Statute respecting juries —the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is

such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the Amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."

The principle set forth in the above case has been reaffirmed time and time again throughout the years. **Bush v. Kentucky** (1882), 107 US 110, 21 Led. 354; **Norris v. Alabama** (1935), 294 US 587, 79 Led. 1074, 55 S.Ct. 579; **Patton v. Mississippi** (1947), 332 US 463, 92 Led. 76, 68 S.Ct. 184; **Cassell v. Texas** (1950), 339 US 382, 94 Led. 839, 70 S.Ct. 629; **Hernandez v. Texas** (1954), 347 US 475, 98 Led. 866, 74 S.Ct. 677; **Eubanks v. Louisiana** (1958), 356 US 584, 2 Led.2d 991, 78 S.Ct. 570; **Whitus v. Georgia** (1967), 385 US 545, 17 Led.2d 599, 87 S.Ct. 643.

It is clear that this court under the 14th Amendment has prohibited any discrimination in the selection of ju-

rors by a state whether it be through its legislature, courts, administrative or executive officers. **Norris v. Alabama** (supra); **Patton v. Mississippi** (supra).

Although most jury discrimination cases reaching this court involved persons of the Negro race, the court has expanded the principles set forth in those cases to any unreasonable and arbitrary discrimination. See **Hoyt v. Florida** (1961), 368 US 57, 1 L.ed.2d 118, 82 S.Ct. 159, in which case a woman defendant claimed that women were arbitrarily excluded from the jury panel. While the Supreme Court disagreed with the view of the Appellant, it stated:

> "We, of course, recognize that the Fourteenth Amendment reaches not only arbitrary class exclusions from jury service, based on race or color, **but also all other exclusions which 'single out' class of persons** for different treatment not based on some reasonable classification." (Emphasis supplied.)

In **Hernandez v. Texas** (1954), 347 US 475, 478, 98 L.ed. 866, 74 S.Ct. 677, the court stated:

> "Although the Court has had little occasion to rule on the question directly, it has been recognized since **Strauder v. West Virginia**, 100 US 303, 25 L.ed. 644, **that the exclusion of a class of persons from jury service on grounds other than race or color, may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws.**" (Emphasis supplied.)

and at Page 478:

> **"When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classifi-**

cations, the guarantees of the Constitution have been violated.'' (Emphasis supplied.)

In the present case by virtue of statute all persons residing outside the city where the court is located are excluded from jury service, although they are within the jurisdiction of the court. This exclusion applies to all rural and farm population of the county. It has long been a principle, as applied under the 14th Amendment, that the jury must be drawn from a cross-section of the community where the court has jurisdiction. This principle regarding jury selection is set forth in **Thiel v. Southern P. Company** (1945), 328 US 217, 90 L.ed. 1181, 66 S.Ct. 984, which case, although involving civil proceedings, made the following observation:

> ''The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. **Smith v. Texas**, 311 US 128, 130, 85 L.ed. 84, 86, 61 S.Ct. 164; **Glasser v. United States**, 315 US 60, 85, 86 L.ed. 680, 707, 62 S.Ct. 457. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discrimination which are abhorrent to the democratic ideals of trial by jury.''

This principle was reaffirmed by the United States Supreme Court in **Carter v. Greene County** (1970), 396 U.S. 320, 24 L.ed.2d 549, 90 S.Ct. 518:

> "The States remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character. Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty."

CONCLUSION

In the present case the State of Iowa, through its legislature, established a court (municipal court) that has county-wide jurisdiction in selected matters which includes misdemeanor criminal cases but has limited the jury selection to the residents of the city in which the court is located. As the 1970 population figures show, such exclusionary process eliminates 17% to 78% of the population within the jurisdiction of the municipal courts, and more specifically such process effectively eliminates all the rural and farm population. The arbitrary elimination of rural residents is not based upon any reasonable or rational premise but is arbitrary and without foundation. The exclusion not only eliminates the rural and farm population from the selection process but has the potential of excluding areas within the county having groups of people of a differing religious, political or racial background, not included within the city from which the jury panel is selected.

It is not unreasonable to argue that the philosophy and thinking of the various groups and classes making up the

rural county may differ from those persons residing in the city where the court is located. It is essential that a person having been charged with a crime be judged by a jury selected from persons representing a cross-section of the community regardless of class distinction.

The jury selection process under Section 602.34, Code of Iowa, virtually eliminates as a class all rural and farm residents as well as potentially eliminating persons of a distinctive class residing in pockets within the county and such exclusion precludes the jury panel from being representative of a cross-section of the community, in violation of the 14th Amendment to the United States Constitution.

Respectfully submitted

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APPENDIX A

State v. Kappos
Cite as 189 N.W.2d 563

State of Iowa, Appellee,

v.

Christopher Kappos, Appellant.

No. 54249.

Supreme Court of Iowa.

Sept. 9, 1971.

Defendant was convicted in the Ames Municipal Court, John L. McKinney, J., of knowingly permitting a minor to purchase or consume alcoholic beverages in his place of business, and he appealed. The Supreme Court, LeGrand, J., held that statute excluding all persons except residents of city from municipal court jury lists was not unconstitutional and did not deprive defendant, who resided outside city limits and was accused of having committed a crime outside city, of an impartial jury trial.

Affirmed.

Becker, J., dissented and filed opinion in which Rawlings, J., joined.

Reynoldson, J., took no part.

1. Constitutional Law Key 250, 267

Jury Key 33(3)

Statute excluding all persons except residents of city from municipal court jury lists was not unconstitutional

aid did not deprive defendant, who resided outside city limits and was accused of having committed a crime outside city but within territorial jurisdiction of the court, of an impartial jury trial, in violation of his rights to equal protection and due process. I.C.A. §§ 602.01 et seq., 602.1; 602.34; U.S.C.A. Const. Amend. 14; I.C.A. Const. art. 1, §§ 9, 10.

2. Criminal Law Key 628(7)

Where prosecution witness' testimony, objected to by defense, was proper rebuttal, it was not necessary that witness' name have been endorsed on information as prerequisite to testifying. I.C.A. § 772.3.

3. Criminal Law Key 683(1)

Where five witnesses produced by defendant charged with knowingly permitting minor to purchase or consume alcoholic beverages or beer on his premises did not attest to defendant's good character but rather attempted to establish his habit in dealing with minors who sought service at his bar, testimony of state witness that defendant did not always follow the practice set out by his witnesses was admissible as proper rebuttal, despite contention that it was improper as relating specific instance to refute evidence of good character. I.C.A. § 124.20, subd. 3.

4. Jury Key 95

Where defendant demonstrated no prejudice, in prosecution for knowingly permitting minor to purchase or consume alcoholic beverages at defendant's bar, retaining on jury panel persons who had earlier served on case involving alleged crime committed by professional dancer while performing at defendant's place of business did not deprive defendant of fair trial and was not error, in light of fact defendant had been allowed to show prejudice on voir dire

examination as to any individual juror's qualifications to serve. I.C.A. §§ 124.20, subd. 3, 779.5; U.S.C.A.Const. Amend. 14; I.C.A.Const. art. 1, §§ 9, 10.

James A. Brewer, Ames, for appellant.

Richard C. Turner, Atty. Gen., and G. Douglas Essy, Asst. Atty. Gen., for appellee.

LeGrand, Justice.

A municipal court jury convicted defendant of violating section 124.20(3). The Code, 1966, which directs that "no person shall knowingly permit any minor to purchase or consume any alcoholic beverage or beer on the premises of a class 'B' * * * permit holder." He was sentenced to pay a fine of $400.00 and appeals from that judgment. We affirm.

Defendant lists three errors upon which he relies for reversal. He asserts (1) that section 602.34, The Code, excluding all persons except residents of Ames from the municipal court jury lists is unconstitutional and deprived him of an impartial jury trial; (2) that the trial court erred in admitting rebuttal evidence; and (3) that the trial court erred in retaining on the jury panel persons who had earlier served on a case involving an alleged crime committed by a professional dancer while performing at defendant's place of business. We consider these asignments in the order set out above.

[1] I. Defendant is alleged to have knowingly permitted minors to purchase or consume beer in his tavern in Cambridge, a small town in Story County. Pursuant to chapter 602, The Code, 1966, the jury which tried defendant came entirely from residents of Ames.

That chapter permits no other course. Section 602.1, authorizes any city having a population of 5000 or more to establish a municipal court. It further defines the munici-

pal court district as being composed of "all that part of each civil township within the corporate limits of such city." Section 602.34 limits the selection of municipal court jurors to those whose names appear in the pollbooks of the last general election in the territory included in the municipal court district. This statute disqualifies from jury service all residents of the county except persons living in Ames, even though the territorial jurisdiction of the court is coextensive with the territorial limits of the county. (Section 602.16, The Code.)

Defendant objects to this exclusion. He says he resides outside the city of Ames and is accused of having committed a crime outside the city, but must nevertheless be tried by a jury composed entirely of residents of that municipality. He challenges the constitutionality of such a statute as being violative of the equal protection and due process provisions of both the federal and state constitutions. (Amendment 14, U. S. Constitution and Article I, sections 9 and 10, Constitution of Iowa.)

There is no merit to defendant's contention. Under the due process and equal protection clauses of both the federal and state constitutions, there is no requirement that all shall invariably be treated alike, only that classifications made be reasonable and not invidiously discriminatory. Becker v. Board of Education (1965), 258 Iowa 277, 282, 138 N.W.2d 909, 912; Board of Directors of Independent School District of Waterloo v. Green (1967), 259 Iowa 1260, 1270, 147 N.W.2d 854, 860; Lee Enterprises, Inc. v. Iowa State Tax Commission (1968), 162 N.W.2d 730, 753.

Statutes and rules of court limiting the area from which jurors may be drawn are not unusual. They have been generally upheld as resting on reasonable and rational grounds, usually to minimize inconvenience to the jurors and expense to the government. Hoyt v. Florida, 368 U.S. 57, 7 L.Ed.2d 118, 121, 82 S.Ct. 159; Crawford v. State, Alaska 1965, 408 P.2d 1002, 1005, 1008; United States v.

Gottfried, 2 Cir., 1948, 165 F.2d 360, 364, cert. den., 333 U.S. 860, 68 S.Ct. 738, 92 L.Ed. 1139; United States v. Titus, 2 Cir., 1954, 210 F.2d 210, 212.

The cases cited by defendant to support his argument are all patently discriminatory in purpose, frequently on racial grounds. They are easily distinguishable from the present case and afford defendant no help. We have been referred to no authority holding it unconstitutional to establish reasonable and rational geographical districts for the selection of jurors as our statute does here.'

We approve this statute the only time we had occasion to review it. Kinsey v. Clark (1933), 215 Iowa 765, 767-768, 246 N.W. 840, 841.

We hold the selection of jurors as provided in section 602.34 did not violate defendant's constitutional rights nor deprive him of an impartial jury.

II. Defendant next complains because Steven Paul was improperly permitted to testify as a rebuttal witness. His objection is two-fold. First, he asserts the witness should not have been allowed to testify because his name was not endorsed on the minutes as required by section 772.3, The Code; and, second, he urges it was error to receive evidence of a specific incident to refute testimony of defendant's good character.

[2] We believe the testimony objected to was proper rebuttal and therefore it was unnecessary that the witness' name be endorsed on the information. State v. Nelson, Iowa, 1967, 153 N.W.2d 711, 714; State v. Johnston (1960), 252 Iowa 335, 340, 105 N.W.2d 760, 702.

[3] We also hold against defendant's second contention assailing the admissibility of a specific instance of alleged bad conduct to refute evidence of good character. We do not reach the merits of this argument because we agree with the trial court that defendant's character was not put in issue. The five witnesses produced by defendant did

not attest to his good character but rather attempted to establish his habit in dealing with minors who sought service at his bar. The State called Steven Paul in rebuttal to show defendant did not always follow the practice outlined by his witnesses.

Although habit is sometimes said to be closely related to character (McCormick, Law of Evidence, section 162, page 343 and 2 Wigmore on Evidence, Third Ed., 1940, sections 375, 376, pages 304-306), they are not the same. We have no doubt that we are dealing here with evidence of habit, not character.

Since the State did not object, we do not decide whether it was proper in the first place to admit evidence of habit. All we hold is that the State was entitled to rebut this evidence, once it was in.

[4] III. The remaining issue deals with permitting jurors who had served on a previous case involving defendant's place of business to serve on this jury. We relate the factual background before considering this assignment.

Prior to the selection of the jury, defendant's counsel orally objected to the presence on the panel of persons who one week earlier had served in the case of State v. Jubceck, in which Linda Jubceck was convicted of lewd and indecent conduct while employed as a go-go dancer in defendant's tavern. Defendant claims the presence of these jurors on this case was prejudicial and deprived him of a fair trial in violation of Amendment 14 to the Constitution of the United States and of Article I, sections 9 and 10, of the Constitution of Iowa.

We cannot agree that this deprived defendant of a fair trial nor that his constitutional rights were violated.

Defendant made a blanket objection, asking disqualification of all who had served on the Jubceck case. The trial

court denied this request but suggested defendant could attempt to show prejudice on voir dire examination, at which time the court would rule on the *individual* juror's qualifications to serve.

We believe the trial court was correct. The grounds for challenge are set out in section 779.5, The Code. We recently held in State v. Grove, Iowa 1969, 171 N.W.2d 519, 520, that the trial court has broad power in acting on challenges to avoid an unfair trial. But there must be some showing of prejudice. In Schoonover v. Fleming, 239 Iowa 539, 546, 547, 32 N.W.2d 99, 104, we held a juror was not disqualified simply because he had previously sat on a case involving similar issues.

Similarly in Snakenburg v. Minneapolis and St. Louis Railway Company, 194 Iowa 215, 220, 188 N.W. 935, 938, we said, "* * * We know of no rule prohibiting a juror's sitting on a case merely because he has been a juror on another case wherein the facts were the same, if he has not formed nor expressed an opinion as to the merits of the case. * * * *The whole matter comes to the question of the juror's prejudice, and the effect of that prejudice on the verdict.*" (Emphasis added.)

Defendant made no effort to show prejudice in fact, although that course was pointedly suggested by the trial court.

The judgment of the trial court is affirmed.

Affirmed.

All Justices concur except Becker and Rawlings, JJ., who dissent and Reynoldson, J., who takes no part.

Becker, Justice (dissenting).

I respectfully dissent.

The key question here involves the power of the legislature to delegate to municipalities the right to create a

judicial forum which has jurisdiction over crimes (and civil controversies) committed outside the city boundaries. Its jurors are selected entirely from city residents.

One should perhaps start with the observation that municipal courts fill a vital role in city government. They are a necessity until and unless replaced by something better. Here we are talking only about their role in controveries which are confined to matters arising beyond their corporate limits.

DEFENDANT'S RIGHTS, JURY SELECTION

The appellant argues the selection of the jury from only a portion of the territorial jurisdiction of the court violated his constitutional rights of due process and the equal protection of the law under the Fourteenth Amendment and also his right to a jury trial. Article I, §§ 9, 10, Iowa Constitution.

One important requirement of due process is that the defendant be tried by a fair and impartial jury. See Note, Constitutional Law: State Jury Selection Procedure Held a Violation of the Fourteenth Amendment, 1967 Duke L.J. 346, 350 (1967).

The selection of a nonrepresentative jury may preclude a defendant from receiving an impartial trial. The United States Supreme Court said in Glasser v. United States, 315 U.S. 60, 86, 62 S.Ct. 457, 472, 86 L.Ed. 680, 707 (1942) (alleged exclusion of women except for member of League of Women Voters):

> "* * * Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best

must not blind us to the dangers of allowing any encroachment whatsoever on this essential right." (loc. cit. 315 U.S. at p. 86, 62 S.Ct. at p. 472).

One standard that courts have adopted for jury selection practices is that the panel be from a "cross-section of the community" or that it be a "body truly representative of the community." See Labat v. Bennett, 365 F.2d 698, 720 (5 Cir. 1966); State v. Madison, 240 Md. 265, 213 A.2d 880, 885 (1965); Allen v. State, 110 Ga. App. 56, 137 S.E.2d 711, 713 (1964); Witherspoon v. Illinois, 391 U.S. 510, 524, 528, 88 S.Ct. 1770, 20 L.Ed.2d 776, 786, 788 (1968) (Douglas concurring). Note, Duke L.J. 346, 350 (1967). The Supreme Court has stated this requirement in several cases:

"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84, 86 (1940) (exclusion of blacks—state court).

"And its exercise (of jury selection) must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community', and not the organ of any special group or class." Glasser v. United States, 315 U.S. 60, 86, 62 S.Ct. 457, 472, 86 L.Ed. 680, 707 (1942).

"Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty." Brown v. Allen, 344 U.S. 443, 474, 73 S.Ct. 397, 416, 97 L.Ed. 469, 498 (1953). (dictum).

And in Thiel v. Southern Pacific Co., 328 U.S. 217, 219, 66 S.Ct. 984, 985, 90 L.Ed. 1181 (exclusion of daily wage-earners) (a federal civil case decided under the Court's supervisory power), the Court said, "The American tradition of trial by jury, * * * necessarily contemplates an impartial jury drawn from a cross-section of the community."

The Georgia Court of Appeals said in Allen v. State, 110 Ga.App. 56, 137 S.E.2d 711, 713 (1964), (white civil rights worker complaining of exclusion of blacks):

> "* * * The exclusionary practice condemned by the Fourteenth Amendment does not depend upon the exclusion from juries of a group to which the defendant belongs or identifies himself, but on the resulting failure of the jury to represent a cross section of the community. * * *."

In the present case, while the defendant and his witnesses were all rural residents of Story County, the jury was drawn exclusively from residents of the City of Ames. As petitioner argues, it is reasonable to believe that the rural residents may differ from those of the city. Some occupations such as farming, would be excluded when the jury is drawn entirely from the city. The defendant in this case is not a farmer although some of his witnesses were. Allen v. State, 110 Ga.App. 56, 137 S.E.2d 711 (1964), involving a white civil rights worker's objections that blacks were excluded from the jury, is authority for the proposition that the defendant need not be a member of the excluded class. Also, State v. Madison, 240 Md. 265, 213 A.2d 880, 882-886 (1965). While exclusion because of race has been involved in many of the jury selection cases, the exclusion of other groups may also violate the defendant's constitutional guarantees. Hernandez v. Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954) (Mexican-Americans); Kentucky v. Powers, 139 F. 452 (C.C.Ky.

1905), (political party); State ex rel. Passer v. Co. Bd. of Renville Co., 171 Minn. 177, 213 N.W. 545 (1927) (women); State v. Madison, 240 Md. 265, 213 A.2d 880 (1965) (belief in God required); Labat v. Bennett, 365 F.2d 698 (5 Cir. 1966) (wage earners and blacks).

"* * * But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. * * *." Hernandez v. Texas, 347 U.S. 475, 478, 74 S.Ct. 667, 670, 98 L.Ed. 866, 870 (1954). (Mexican-Americans.)

"* * * We of course recognize that the Fourteenth Amendment reaches not only arbitrary class exclusions from jury service based on race or color, but also all other exclusions which 'single out' any class of persons 'for different treatment not based on some reasonable classification.' * * *." Hoyt v. Florida, 368 U.S. 57, 60, 82 S.Ct. 159, 7 L.Ed.2d 118, 121 (1961) (women—held not violation).

"* * * This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and *geographical* groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials *without systematic and intentional exclusion of any of these groups.* * * *." Thiel v. Southern Pacific Co., 328 U.S. 217, 220, 66 S.Ct. 984, 90 L.Ed. 1181 (1946) (exclusion of daily wage earners). (Emphasis added.)

While Thiel was decided on the basis of the Supreme Court's supervisory power over the federal courts and not on constitutional grounds, "* * * the principles discussed in those opinions are applicable to the issue of the citizen's rights in State courts to the protections of the Fourteenth Amendment." Allen v. State, 110 Ga.App. 56, 137 S.E.2d 714, 714, (1964). Also see, Labat v. Bennett, 365 F.2d 698, 722 (5 Cir. 1966).

The majority opinion cites United States v. Gottfried, 165 F.2d 360 (2 Cir. 1948). In that case, the Circuit Court of Appeals upheld the jury selection practices in the Southern District of New York which excluded heavily rural counties. The court pointed out that there were rural areas within the counties from which the panel was drawn, that the inclusion of the eight rural counties would only increase the likely number of rural jurors on a particular jury from one to two, and that the bulk of the population was in the three counties from which the jury was drawn (only 550,000 of 4,400,000 total population of the district lived in the excluded area). (165 F.2d at pp. 363-364). The court felt this was a valid practice under the statute, 28 U.S.C. § 1865(a), allowing the court to divide the district for purposes of an impartial trial, economy, and ease of attendance. (165 F.2d at p. 364). The court did note that there could not be deliberate discrimination against geographical areas in jury selection:

> "* * * jurors must be drafted 'without systematic and intentional exclusion' of any 'geographical' as well as of any 'social, religious, racial' or 'political' group; and that may well forbid the officials who draw up the lists from excluding any part of the district at their own choice. We assume that they may not do so; but if they do not, 'geographical' uniformity is satisfied * * *." (loc. cit. 165 F.2d at p. 364).

Another case cited in the majority opinion is Crawford v. State, 408 P.2d 1002 (Alaska 1965). In that case, jurors

were called only from the area within 15 miles of Anchorage. The court noted that seventy percent of the population lived within that area but that it included only one-half of one percent of the total area. While the majority of natives, Eskimos and farmers lived outside of this area, nonetheless a substantial number of these persons lived within the area from which the jury was drawn. (408 P.2d at p. 1067). The court felt that Anchorage and the surrounding area could give a fair cross-section of the community. (408 P.2d at p. 1069).

Appellee's brief cites Liskowitz v. State, 229 Wis. 636, 282 N.W. 103, 106 (1938):

> "* * * (defendant contends) that because Waukesha county is divided into two municipal court districts and the municipal courts have jurisdiction to try the offenses charged against the defendant, the jury should have been drawn from the municipal court district in which the offense charged was committed. *Had the prosecution been laid in a municipal court of the county, no doubt the jury trying him should and would have been selected from the district comprising that court's territorial jurisdiction.* But the jurisdiction of the municipal court is concurrent with that of the circuit court in criminal cases. The circuit court had jurisdiction. The trial being in the circuit court, it seems manifest that the jury was properly drawn from the county. * * *." (Emphasis added).

United States v. Gottfried, and Liskowitz v. State, both supra, would appear to be in favor of appellant's contention that the jury should have been drawn from the county since the entire county is within the municipal court's territorial jurisdiction.

VENUE

"In the absence of any limitation by constitutional provision, it seems to be generally recognized that the

power of a state legislature to fix the venue of criminal prosecutions in a county or district other than that in which the crime was committed is unrestricted." Annotation, Constitutionality of Statute for Prosecution of Offense in county other than that in which it was committed, 76 A.L.R. 1034, 1035; Wharton's Criminal Law and Procedure (1957), Vol. 4, § 1509, p. 95.

One exception to this rule is Swart v. Kimball, 43 Mich. 443, 5 N.W. 635 (1880) in which the Michigan Supreme Court declared unconstitutional a statute providing for trial, for a specific offense in any county in the state. The state constitution provided merely that, "The right of trial by jury shall remain * * *." The court discussed the meaning of the right to jury trial. "What right? Plainly the right as it existed before—the right to a trial by jury as it had become known to the previous jurisprudence of the state." (loc. cit. 5 N.W. at p. 637). Blackstone, the court said, defined vicinage as generally the county. In England, the right to a jury of the vicinage is "an old rule of the common law." Some English statutes, dealing with crimes such as treason, allowed trial in any county but the court felt that these exceptions were among the grievances leading to the American Revolution. "If they were forbidden by the unwritten constitution of England, they are certainly unauthorized by the unwritten constitution of the American states, in which the utmost pains have been taken to preserve all the securities of individual liberty." (loc.cit. 5 N.W. at p. 638). "* * * no one doubts that the right to a trial by a jury of the vicinage is as complete and certain now as it ever was, and that in America it is indefeasible." (5 N.W. at p. 639). The court then commented on the reason for the rule:

"* * * But a disadvantage quite as great as the want of means is likely to be experienced in the fact that

> the accused is away from his friends and among strangers, who will know of him only this: that he is under arrest upon presumptive proof of being a felon. Of what avail is a man's good reputation to him under such circumstances, when the neighbors who know it are at a distance, and when the very accusation among strangers will necessarily fix upon him a strong suspicion." (loc.cit. 5 N.W. at p. 639).

The majority of states allow a change of venue on the application of the prosecution. Wharton's Criminal Law and Procedure (1957), Vol. 4, § 1515, p. 106. In State ex rel. Fletcher v. District Ct., 213 Iowa 822, 238 N.W. 290 (1931), the Iowa Supreme Court upheld such a change of venue when an impartial trial could not be had in the county.

Some courts, where the constitution expressly required a trial by the county, have denied the right of the prosecution to a change of venue. State ex rel. Parker v. Roberds, 155 Kan. 165, 123 P.2d 806 (1942); State v. Knapp, 40 Kan. 148, 19 P. 728 (1888); Wheeler v. State, 24 Wis. 52 (1869); Kirk v. State, 41 Tenn. 344 (1860); State v. Black, 131 Or. 218, 282 P. 228 (1929)

In People v. Powell, 87 Cal. 348, 25 P. 481 (1891), the California court declared unconstitutional a statute allowing for change of venue on application of the district attorney. The California constitution provided only that, "The right of trial by jury shall remain inviolate. * * *." This is the same wording as in the Iowa Constitution, Art. I, § 9. The court said:

> "* * * Our constitution does not define the right of trial by jury. It was a right then existing, the extent, scope, and limitations of which were well understood, and the constitution simply provides that such right shall be secured and remain inviolate. If the

> right at common law was as above stated (a trial of the vicinage or county), there can be no question but that an act of the legislature, authorizing the trial of a defendant out of the county where the offense is charged to have been committed, is an abridgement of the right, and for that reason void. * * *."

The court felt that the practice of allowing the prosecution a change of venue was "almost uniformly condemned as unconstitutional in other states." The court did not feel that the absence of an express right to trial by the county which was present in these other states made any difference. The right of jury trial was well understood, they reasoned. "Does not our constitution confer upon a defendant charged with crime precisely the same right, although not expressed in terms?" (loc.cit. 25 P. 481, 483).

In Olive v. State, 11 Neb. 1, 7 N.W. 444, 446 (1880), the Nebraska Supreme Court in discussing a state constitutional provision ensuring the right to a jury from the county or district where the offense was committed said:

> "* * * such law must be accompanied by one under which jurors can be called from the whole body, and not from a portion, merely, of such district. In other words, the trial district and the jury district must be the same. The grand design of this provision of the fundamental law seems to be to secure to the accused a trial by a jury from the vicinage where the crime is supposed to have been committed, so that he may have the benefit of his own good character and standing with his neighbors, if these he has preserved, and also of such knowledge as the jury may possess of the witnesses who give evidence before them. * * *."

The Nebraska court has said that the state constitutional requirement derived from the common law:

"* * * The object, then, as we have seen, was to embody in the fundamental law of the state an ancient rule of the common law, by which is secured to the accused, in criminal cases, a substantial right. The idea that it was intended to include the territory within which the accused is known, and where his good character will avail him, is a reasonable one, and consistent with recognized principles of the law. * * *." State ex rel. Scott v. Crinklaw, 40 Neb. 759, 59 N.W. 370, 372 (1894).

In State v. Pugsley, 75 Iowa 742, 748, 38 N.W. 498, 501 (1888), a statute providing that the venue for an offense committed within 500 yards of the county boundary line could be in either county was upheld against the argument that this violated defendant's constitutional rights. The court said that this statute had been enacted before the constitution. "This being so, the right of trial by jury is the same now as it was when the first construction was adopted, and therefore the statute in question is not unconstitutional, for the reason that constitutional rights of the defendant have not been in any respect impaired."

What conclusion is to be drawn from all this? Problems of local prejudice against the State and the State's rights to a change of venue under such circumstances are not involved here. What we are talking about is both a jurisdictional and venue problem. Where original *initial* jurisdiction (and venue) is placed in a court which draws absolutely none of its jurors from the area over which jurisdiction *and venue* is given, there is certainly a systematic exclusion of jurors on a geographical basis. Thus, I would hold there is a denial of a fair, impartial jury which truly represents a cross-section of the community and a denial of due process.

There are cases to the contrary. State v. Kemp, 34 Minn. 61, 24 N.W. 349 (1885); Karnes v. Commonwealth,

125 Va. 758, 99 S.E. 562 (1919); State v. Fendrick, 77 Ohio St. 298, 82 N.E. 1078 (1907); State v. Henning, 83 Ohio App. 445, 78 N.E.2d 588 (1948); State v. King, 84 Ohio App. 24, 85 N.E.2d 157 (1948).

However, I submit these cases allow the desire for jury convenience to overrule the demand for a properly impaneled jury.

POSTURE OF COUNTY RESIDENTS

It is submitted that jurisdiction and venue in municipal courts over county controversies is equally an unconstitutional delegation of power over county residents. They are systematically excluded from the operation of the court that has jurisdiction over them. This is true not only of their role as jurors but of their role as nominators and electors of the judges, court clerks and bailiffs.

POSTURE OF CITY RESIDENTS

City residents as jurors are equally imposed upon. They must serve if unexcused. Often this is a real personal sacrifice. Yet they are asked on a regular basis to serve on cases that do not involve their community.

CONCLUSION

In short, municipal judges and court personnel are elected by the city electors; the juries are entirely selected from city inhabitants; yet a nonresident of the city may be tried (without a showing of local prejudice) by a city-selected judge and a city-impaneled jury for a *crime allegedly committed outside the city limits.* This, in my judgment, is not a trial by a jury of one's peers. I would reverse and hold a municipal court as presently organized, does not have original jurisdiction—or venue—over crimes committed wholly outside the city which created it.

Rawlings, J., joins in this dissent.

APPENDIX B

Iowa Statutes

Section 602.14, Code of Iowa:

JURISDICTION CIVIL MATTERS. It shall have concurrent jurisdiction with the district court in all civil matters where the amount in controversy does not exceed two thousand dollars, except in probate matters, actions for divorce and alimony and separate maintenance, juvenile proceedings unless otherwise authorized, and those directly affecting the title to real estate.

Section 602.15, Code of Iowa:

CRIMINAL MATTERS. In all criminal matters the court shall exercise the jurisdiction conferred on the district court for the prosecution of misdemeanors, on justice of peace courts, mayors' courts, and police courts, except that the mayor's court of any incorporated city or town within such municipal court district other than the city within which said court is established shall have exclusive jurisdiction of prosecutions for the violations of the ordinances of such town.

Section 602.16, Code of Iowa:

TERRITORIAL JURISDICTION AND POWERS. The jurisdiction of the municipal court shall be coextensive with the territorial limits of the county. However, in counties having two jurisdictions of the district court, the jurisdiction of the municipal court is restricted to the territory of the district court where the municipal court is situated. The powers exercised by the district court and the judges thereof relating to county attorney informations and the prosecution of misdemeanor offenses

is conferred upon and may be exercised by the municipal court and the judges thereof. In all matters of which the municipal court has jurisdiction, the court and the judges shall have the same powers in reference to injunctions, writs, orders, and other proceedings in and out of court as are possessed by the district court and the judges thereof. Where a municipality with a municipal court extends into a second county, the territorial jurisdiction for both municipal and district court powers shall be extended only to the additional area within the corporate limits of the municipality within the second county. The second county is defined for purposes of this section as the county into which an affected city annexes additional territory after January 1, 1969.

Section 753.2, Code of Iowa:

JURISDICTION OF DISTRICT COURT. The local jurisdiction of the district court is of offenses committed within the county in which it is held, and of such other cases as are or may be provided by law.

APPENDIX C

In the Supreme Court of Iowa

State of Iowa,
Appellee,
vs.
Christopher Kappos,
Appellant.

Case No. 75 54249

Notice of Appeal to the Supreme Court of the United States

(Filed October 8, 1971)

Notice is hereby given that Christopher Kappos, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the Supreme Court of Iowa, affirming the Judgment of conviction entered herein on September 7, 1971.

This appeal is taken pursuant to 28 USC, §1257(2).

Hegland, Newbrough, Johnston & Brewer
612 Kellogg Avenue
Ames, Iowa 50010
Phone No. 232 1761
By James A. Brewer
Attorney for Appellant

I, Richard C. Turner, Attorney General of the State of Iowa do hereby acknowledge receipt of the foregoing Notice of Appeal in Des Moines, Iowa, on this 8th day of October, 1971.

Richard C. Turner
Attorney General of the State of Iowa